Virginia Department of Rail and Public Transportation

DBE Program – 49CFR Part 26

Revised April 1, 2009

Disadvantage Business Enterprise Program

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A. Organizational Chart

Program Objectives (§26.1)

The Virginia Department of Rail and Public Transportation (DRPT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. DRPT has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, DRPT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of DRPT to ensure that DBEs, as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy to:

1. Ensure nondiscrimination in the award and administration of DOT assisted contracts;
2. Create a level playing field on which DBEs can compete fairly for DOT assisted contracts;
3. Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove barriers to the participation of DBEs in DOT assisted contracts; and
6. Assist the development of firms that can compete successfully in the market place outside the DBE Program.

POLICY STATEMENT

Disadvantaged Business Enterprise Program

The Virginia Department of Rail and Public Transportation (DRPT) is committed to the policy of the U.S. Department of Transportation (USDOT) which provides guidelines that this agency will utilize to ensure a level playing field and foster equal opportunity for Disadvantaged Business Enterprises (DBEs). Our endorsement of this policy is in keeping with our objectives to be responsive to citizens' needs and to ensure equality of opportunity and compliance with Title 49, Code of Federal Regulation (CFR), Part 26.

To ensure compliance with this policy, all DRPT Program Managers will monitor and evaluate the award of contracts for compliance with 49 CFR Part 26. Program Managers will also report to DRPT's DBE Liaison Officer on the progress made towards accomplishing DRPT's stated goals. I expect all levels of management to fully support both the letter and spirit of this program. To this end, managerial, supervisory and other personnel charged with implementation of elements of this program may expect their performance evaluation to reflect, in part, the effectiveness of their response to this program.

I am therefore, charging DRPT's DBE Liaison Officer, Rural Transit Program Specialist, Kenneth Pollock, with the responsibility to implement DRPT's revised Disadvantaged Business Enterprise (DBE) program and to make appropriate recommendations to me, where needed, to strengthen the program.

Charles M. Badger, Director

April 1, 2009

Definitions of Terms (§26.5)

Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121**.**

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Compliance means that all activity has been correctly implemented.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Department or DOT means the U.S. Department of Transportation, including, but not limited to: the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), the Federal Aviation Administration (FAA) and the Federal Railroad Administration.

Disadvantaged Business Enterprise or DBE means a for-profit small business concern --

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement**.**

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or
is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means any activity that has not been correctly implemented.

Operating Administration or Administrator means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal

Transit Administration (FTA) or Federal Railroad Administration . The "Administrator" of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse**.** Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

Primary recipient means a recipient of DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on DRPT’s part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality**.**

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms. Set-asides are illegal per the Commonwealth of Virginia procurement regulations.

Small Business Administration or SBA means the United States Small Business Administration.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b)
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Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is --

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Nondiscrimination. (§26.7)

The Virginia Department of Rail and Public Transportation (DRPT) will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin. Moreover, in administering its DBE program, DRPT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

DBE Program Updates (§26.21)

DRPT will continue to carry out this program until all funds from DOT financial assistance have been expended. DRPT will provide to DOT updates representing significant changes in the program.

Quotas (§26.43)

DRPT does not use quotas in any way in the administration of this DBE program.

DBE Liaison Officer (DBELO) (§26.45)

DRPT has designated Kenneth Pollock as the DBE Liaison Officer. He may be contacted at the following: 600 East Main Street, Suite 2102, Richmond, VA 23219, (804) 786-7858, and e-mail kenneth.pollock@drpt.virginia.gov. In that capacity, he is responsible for implementing all aspects of the DBE program and ensuring that DRPT complies with all provisions of 49 CFR Part 26. Mr. Pollock has direct, independent access to Charles M. Badger, Director for DRPT concerning DBE program matters. Mr. Pollock will devote a portion of his time to the program. An organization chart displaying the DBELO's position in the organization is found in Attachment A to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination other appropriate officials. Duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by DOT
2. Reviews third party contracts for compliance with this program
3. Works with sub-grantees and staff to set overall annual goals
4. Analyzes sub-grantees goals development process
5. Advises the Director on DBE matters and achievement
6. Plans and participates in DBE training seminars
7. Coordinates with Virginia Department of Minority Business Enterprise (DMBE) on the Uniform Certification Process in Virginia

Federal Financial Assistance Agreement Assurance (§26.13)

DRPT has signed the following assurance, applicable to all DOT-assisted contracts and their administration. DRPT will also include this language in financial assistance agreements with sub-recipients:

> The Virginia Department of Rail and Public Transportation (DRPT) shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to DRPT of its failure to carry out its approved program, DRPT may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

DBE Financial Institutions (§26.27)

It is the policy of DRPT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. DRPT has made the following efforts to identify and use such institutions: To date we have identified the following such institutions:

Consolidated Bank and Trust Company 320 N, 1st Street Richmond, Virginia 23219	(804) 771-5200
Consolidated Bank and Trust Company 5214 Chamberlayne Avenue Richmond, Virginia 23227	(804) 771-5290

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Directory (§26.25)

In support of DRPT's DBE program, the Virginia Department of Minority Business Enterprise (DMBE) maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of most recent certification, and the type of work the firm has been certified to perform as a DBE. DMBE updates the directory as necessary. A copy of the directory is made available to sub-grantees of DRPT. The Directory may be found at www.dmbe.virginia.gov., click on DBE Vendor Directory.

Required Contract Clauses (§§26.13, 26.29)

Contract Assurance

We will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

> The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

Prompt Payment

We will include the following clause in each DOT-assisted prime contract:

> The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than seven (7) days from the receipt of each payment the prime contractor receives from the Virginia Department of Rail and Public Transportation (DRPT) or its sub-grantees. The prime contractor agrees further to return retainage payments to each subcontractor within seven (*7)* days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of DRPT of its sub-grantees. This clause applies to both DBE and non-DBE subcontractors.

Monitoring and Enforcement Mechanisms (§26.37)

We will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps provided in §26.109. DRPT also will consider similar action under its own legal authorities, including responsibility determinations in future contracts.

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Overall Goals (§26.45)

DRPT's overall goal for FY 2009 is 3% of the federal financial assistance DRPT will expend in DOT assisted contracts.

DRPT will begin using its overall goal on October 1 of each year, unless DRPT has received other instructions from DOT.

Transit Vehicle Manufacturers (§26.49)

DRPT will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, DRPT may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

Contract Goals (§26.51)

DRPT will use contract goals to meet any portion of the overall goal it does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of DRPT's overall goal that is not projected to be met through the use of race-neutral means.
DRPT will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). DRPT will express its contract goals as a percentage of the total amount of a DOT-assisted contract.

Good Faith Efforts (§26.53)

Information to be submitted

DRPT treats offerors' compliance with good faith efforts requirements as a matter of responsibility. Therefore, each solicitation for which a contract goal has been established will require the offerors to submit the following:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform:
3. The dollar amount of the participation of each DBE firm participation
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
6. If the contract goal is not met, evidence of good faith efforts.

Demonstration of good faith efforts

The obligation of the offeror is to make good faith efforts. The offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to part 26.

DRPT Program Managers are responsible for determining whether an offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsible.

DRPT will ensure that all information is complete and accurate and adequately documents the offeror's good faith efforts before we commit to the performance of the contract by the offeror.

Good Faith Efforts when a DBE is replaced on a contract

DRPT will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. DRPT will require the prime contractor to notify the DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation. In this situation, DRPT will require the prime contractor to obtain DRPT's prior written approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts..

Counting DBE Participation (§26.55)

DRPT will count DBE participation toward overall and contract goals as provided in 49 CFR §26.55.

Certification (§§26.61 – 26.91)

DRPT will use the certification standards of Subpart D of part 26 and the certification procedures of Subpart E of part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. DRPT will make our certification decisions based on the facts as a whole.

Process

Certification application forms and documentation requirements can be found at www.dmbe.virginia.gov. For information about the certification process or to apply for certification, firms should contact: The Virginia Department of Minority Business Affairs, 1111 East Main street, Suite 300, Richmond, VA 23219, 804-786-5560 or at www.dmbe.virginia.gov.

In the event DRPT proposes to remove a DBE's certification, DRPT will follow procedures consistent with §26.87 If DRPT denies a firm's application or decertifies it, it may not reapply until twelve (12) months have passed from DRPT's action.

Certification Appeals

Any firm or complainant may appeal DRPT's decision in a certification matter to DOT. Such appeals may be sent to:

U.S. Department of Transportation
Office of Civil Rights
Certification Appeals Branch
400 7th St., SW, Room 2104
Washington, DC 20590

DRPT will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for DRPT's DOT-assisted contracting (e.g., certify a firm if DOT has determined that DRPT's denial of its application was erroneous).

Recertifications

To date, DMBE has reviewed and recertified all of the firms listed in the directory and determined that they meet the eligibility criteria of Subpart D of Part 26 and Subpart E of Part 26. Each firm will be recertified no later than three years from the most recent certification date. The firms will be reviewed in chronological order based on the submittal of the information required for recertification.

"No Change" Affidavits and Notices of Change

All DBEs will be required to inform DMBE, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with the application for certification.

Also, all owners of all certified DBEs will be required to submit to DMBE, on the anniversary date of their certification, a "no change" affidavit meeting the requirements of 26.83(j). A copy of the renewal application can be found at www.dmbe.virginia.gov.

DMBE will require DBEs to submit with this affidavit documentation of the firm's size and gross receipts. DRPT will notify all currently certified DBE firms of these obligations by letter sixty (60) days in advance of the due date of the recertification information. This notification will inform DBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of Part 26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a Part 26 eligibility requirement (e.g., personal net worth), the obligation to submit a notice of change applies.

Personal Net Worth

DMBE will require all disadvantaged owners of applicants and of currently-certified DBEs whose eligibility under part 26 we review, to submit a statement of personal net worth at the time of certification or recertification The statement of personal net worth can be found at www.dmbe.virginia.gov.

Reporting and Confidentiality

Monitoring Payments to DBEs

DRPT will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of DRPT or DOT. This reporting requirement also extends to any certified DBE subcontractor.

DRPT will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

DRPT will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

Reporting to DOT

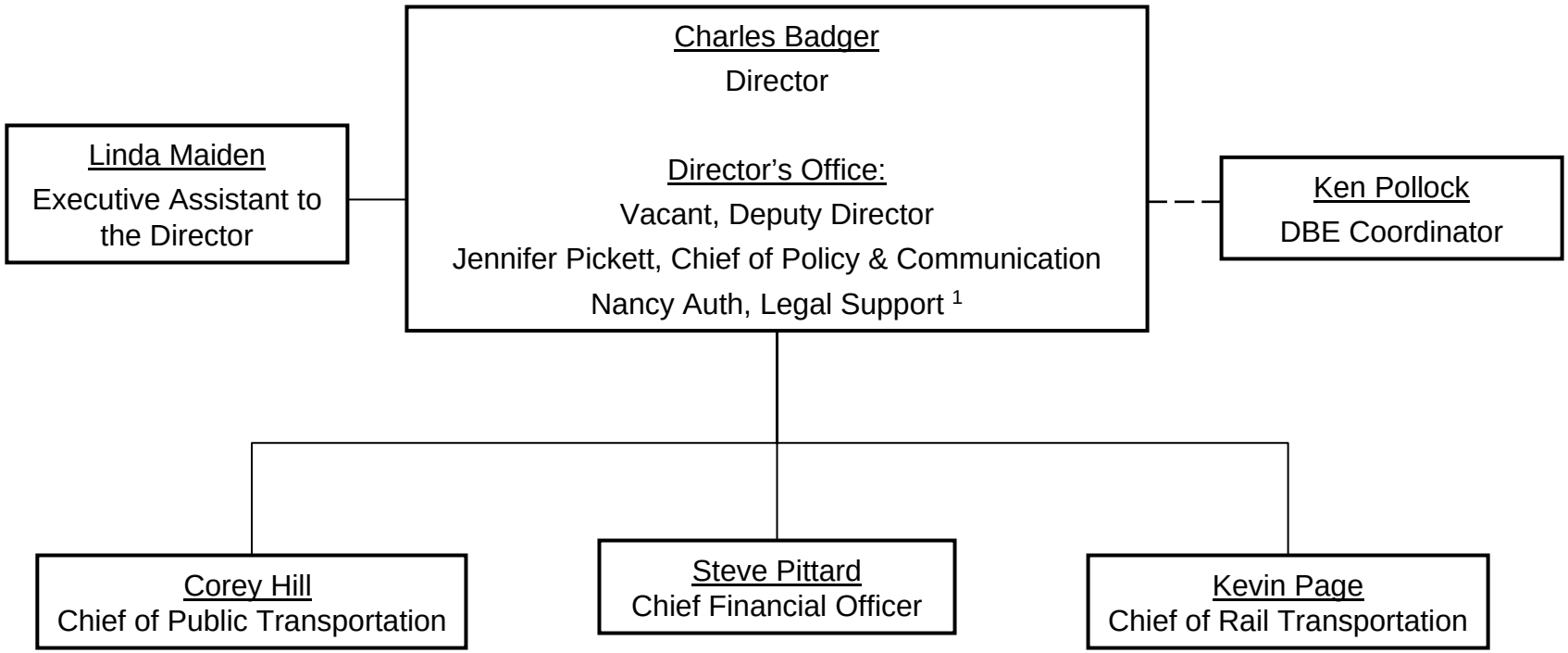
DRPT will report DBE participation to DOT as follows:

DRPT will report DBE participation on a semi-annual basis, using the *Uniform Report of DBE Awards or Commitments and Payments*. These reports will reflect payments actually made to DBEs on DOT assisted contracts.

Confidentiality

DRPT and DMBE will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law Notwithstanding any contrary provisions of state or local law, DRPT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

Virginia Department of Rail and Public Transportation



[1]Office of the Attorney General

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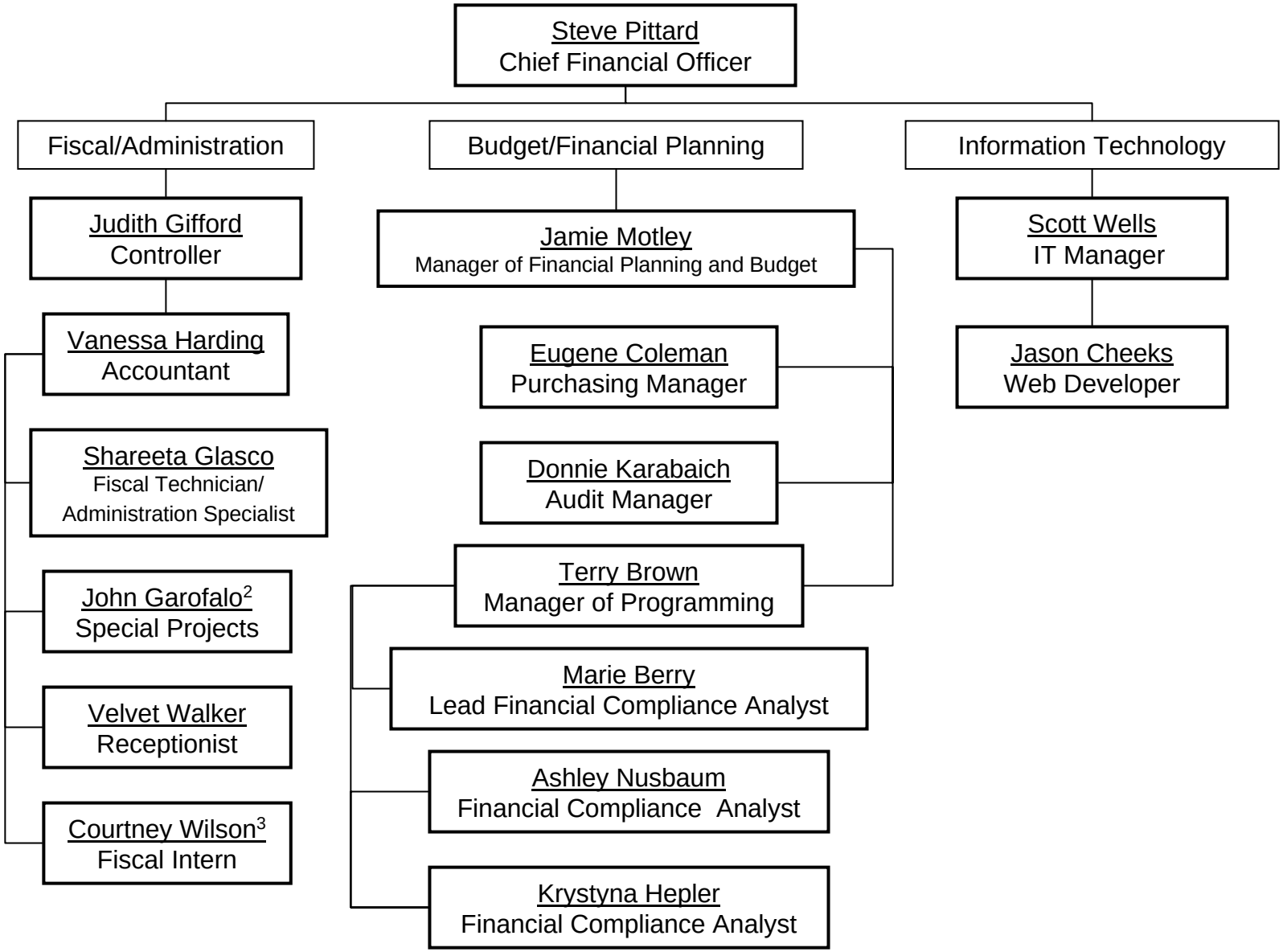
Finance and Administration



[2] P-14 Position
[3] Grant Funded Position

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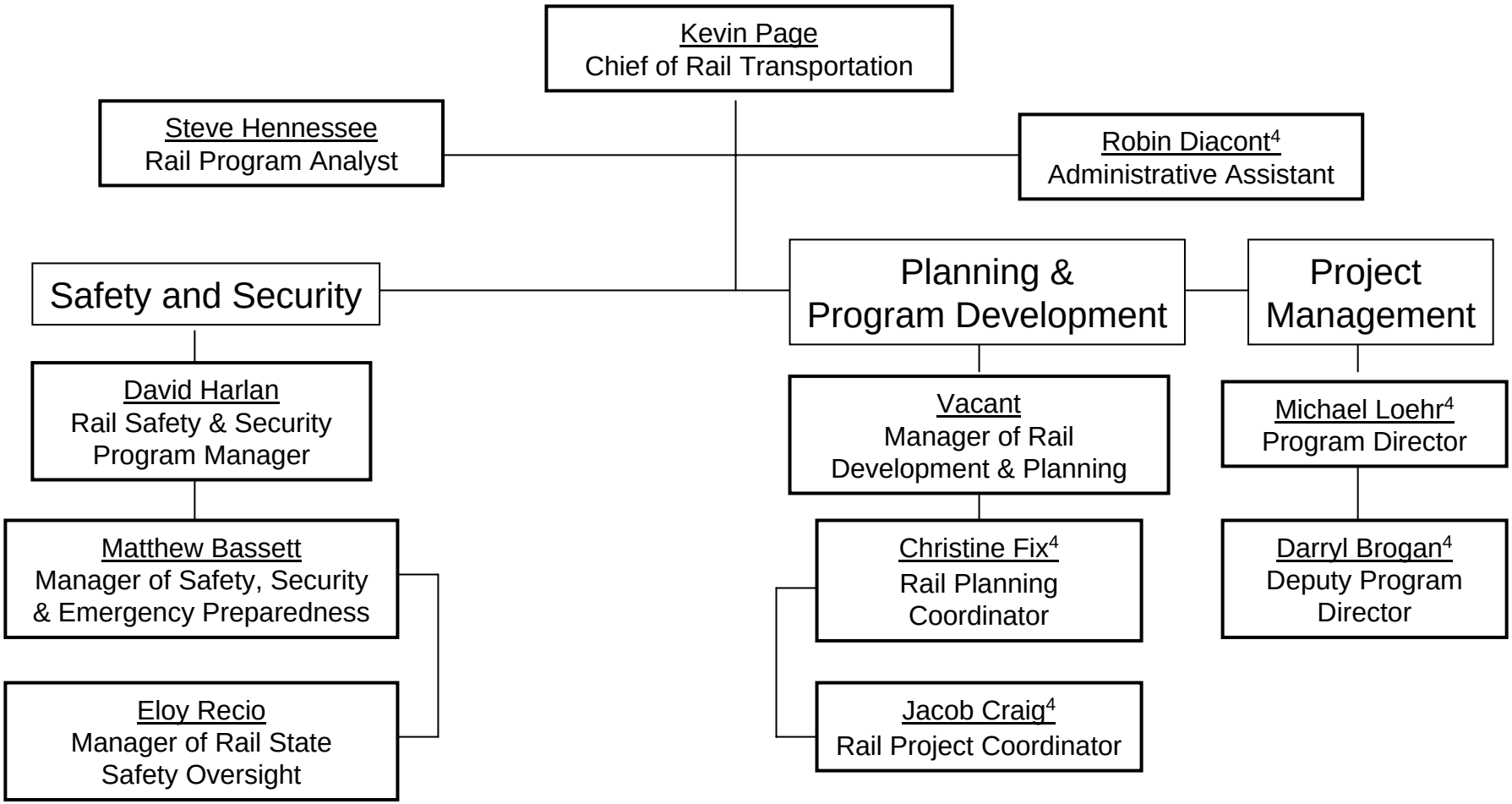
Rail Transportation



[4] Consultant Support

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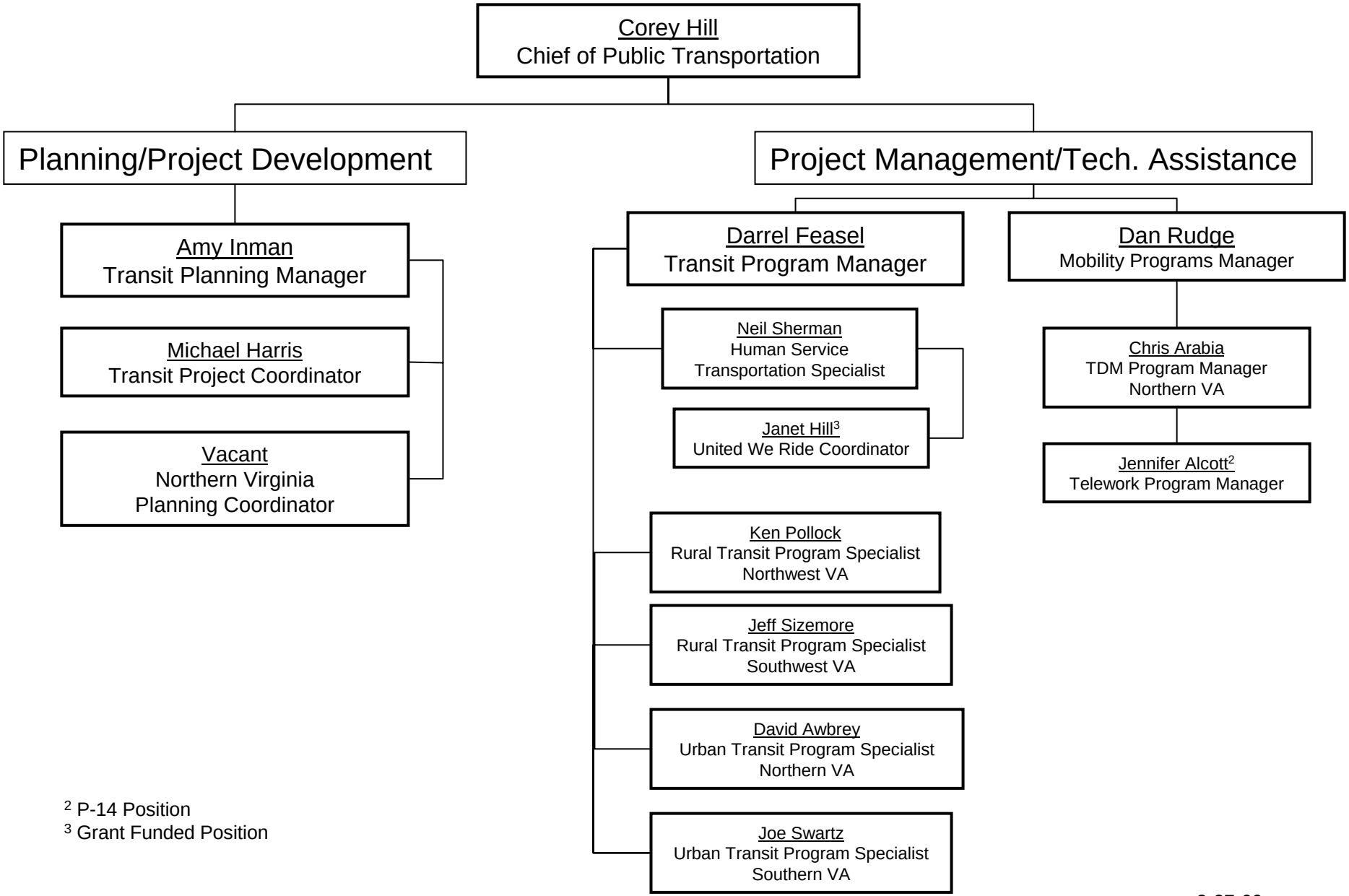
Public Transportation



[2] P-14 Position
[3] Grant Funded Position

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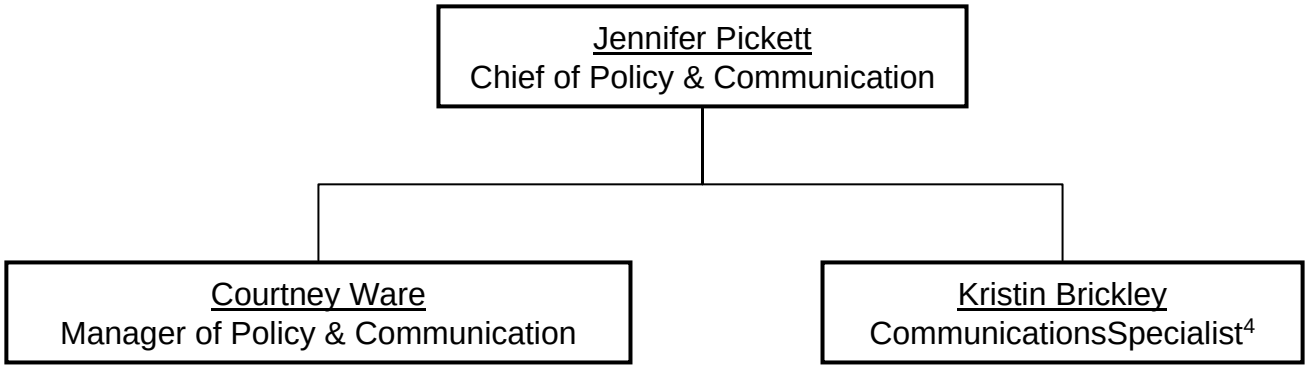
Policy and Communication



[4] Consultant Support